



DATE: **September 28, 2000**

CASE NO. **2000-INA-96**

*In the Matter of:*

**EDWARD EMES,**  
*Employer*

*on behalf of*

**ROALINDA RIVERA,**  
*Alien*

Certifying Officer: Richard E. Panati,  
Philadelphia, Pennsylvania

Appearance: Luis F. Salgado, Esquire  
Washington, DC

Before: Burke, Wood and Vittone  
Administrative Law Judges

### **DECISION AND ORDER**

***Per Curiam*** This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

### **Statement of the Case**

The Employer has filed an *Application for Alien Employment Certification* (ETA 750) to permit him to employ the Alien as a Social Secretary with the following duties:

Coordinates social business and personal affairs of employers. Confers with employer on contemplated social functions. Sends invitations and arranges for decorations and entertainment. Reads and answers routine correspondence using personal computer or in own handwriting. Manages financial affairs of household. Answers telephone and takes messages.

(AF 32).

Upon being advised by the agency responsible for the initial processing of the application that his wage offer was below the prevailing wage in the area of employment, the Employer amended the ETA 750 to provide a wage of \$12.08 per hour with time and a half for over 40 hours. (AF 20).

The Employer reportedly received four applicants as the result of his having advertised the position prior to the filing of the ETA 750. Three applicants were rejected for failing to submit a requested resume. The fourth was rejected because she was not interested in the clerical aspects of the position. (AF 26-27).

The CO issued a Notice of Findings (NOF) in which he questioned whether the Employer's job offer of a social secretary was a bona fide offer and not an effort to upgrade a household position to that of a skilled worker. (AF 17-19). The Employer was directed to furnish documentation by October 26, 1999, to include the answers to twelve interrogatories. These involved any history of employment of a social secretary in his household; a detailed schedule of business and social entertainment events over the past two years; a list of personal affairs that the Alien will be required to handle; a list of household accounts to be maintained by the Alien; work schedules of adults residing in the household; a list of any duties the Alien will be required to perform other than that of a social secretary; the percentage of Employer's disposable income which will be devoted to paying the Alien's salary, documented by a copy of his Federal tax return; and, information regarding any other household help employed, the Alien's duties when initially hired, and the Alien's experience as a social secretary. (AF 18-19).

The Employer responded to the NOF as follows:

In response to your letter asking for a rebuttal, I find it difficult to directly rebut due to the extenuating circumstances. Ms. Rivera, a graduate of the Polytechnic University of the Philippines, qualified for and has fulfilled all the requirements of the job description. My heart attack, open heart surgery, and resultant debilitation, combined with my age

(70), has altered our situation, and my wife was retired from the World Bank.

Entertainment (a non-deductible item not requiring records for tax purposes) was greatly reduced. Assisting me in the many details of managing my rental property, with a market value exceeding six million dollars, was prioritized.

Approximately 5.5% of our disposable income is being used to pay Ms. Rivera's salary, exclusive of non taxable items.

We were familiar with her education, work ethic and capabilities. She is always at work on time, and has flexed with our specific needs. She does not smoke or drink, had excellent references and has been a delight to have in our home. She is diligent about her work and time requirements. On the other hand, we effected little or no response to our ads and not a single person, who might have been qualified, provided references or a resume. When we followed up, they had moved or did not respond.

It would work an extreme hardship to be put in a position where we had to find a replacement. Would you please advise us in a timely manner were such a possibility to exist so we could seek counsel as this is not within our parameters of experience.

(AF 15). The only documentation which was included with the rebuttal was a copy of the Employer's 1998 1040. (AF 16).

Upon review of the Employer's rebuttal, the CO issued a Final Determination denying the application. (AF 10-12). Specifically, the CO found that, other than establishing his ability to pay the wages of a Social Secretary, the Employer had failed to furnish the documentation requested in the NOF. The CO noted that it appeared the only duties the Alien was to perform was assisting the Employer with managing his rental property. (CO 11-12).

On November 24, 1999, the Employer requested a review of the denial of his application. Appended thereto were answers to questions posed in the NOF. (AF 1-9). Further, following submission of the record to the Board for its review, substantial additional documentation has been submitted on behalf of the Employer.

### **Discussion**

Section 656.20 (c)(8) of the regulations requires that the Employer offer a *bona fide* job opportunity. *Modular Container Systems, Inc.* 1989-INA-228 (July 16, 1991) (*en banc*). As the Board held in *Carlos Uy III* 1997-INA- 304 (March 3, 1999), where an employer seeks to hire a skilled worker for his or her household, documentation is required to establish that the position is indeed a skilled and not an unskilled one. The basis for this is to assure that a job offer has not been artificially upgraded to provide the alien with a priority visa status. Although *Uy* dealt specifically with the position of a household cook, we see no reason why the situation is any different in regard to the position involved in the instant case.

The regulations at § 656.25 allows 35 days from the NOF for the filing of a rebuttal. If the CO requests documentation which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1998 (*en banc*)). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is grounds for the denial of the application. *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991).

In the instant case, the CO's request for documentation is in keeping with the nature of the evidence that the Board noted in *Uy* as being pertinent to an inquiry as to whether a job opportunity is *bona fide*. Except for the income information, the Employer failed to furnish the evidence sought in the NOF within the 35 days allowed for the same. He has not shown that the evidence was not reasonably available within the 35 day period or timely request an extension for filing his rebuttal. He did not request a reconsideration by the CO and, in any event, the CO would not have been obligated to do so based on evidence which should have been submitted with the Employer's rebuttal. *Royal Antique Rugs, Inc.*, 1990-INA-529 (Oct. 30, 1991). Finally, it is well settled that evidence first submitted with the request for review will not be considered by the Board, and neither will evidence submitted with the brief on appeal. See, e.g., *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *O'Malley Glass & Millwork Co.*, 1988-INA-49 (Mar. 18, 1989).<sup>1</sup>

As the Employer has failed to file a fully documented rebuttal as directed by the CO, his application must be denied.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

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Todd R. Smyth, Secretary to the  
Board of Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or

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<sup>1</sup>We do not mean to imply that the outcome of this case would be any different even if we did consider the Employer's late evidence. As noted by the CO there seems to be a serious question as to whether the job offer has been accurately described in that it appears that the Alien acts as a business secretary rather than as a social secretary.

maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, DC 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.